IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1420

CHICAGO HEALTH CLUBS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL L. SKLAR
MARTIN J. DUBOWSKY
180 North Michigan Avenue
Chicago, Illinois 60601
(312) 641-5252
Attorneys for Petitioner

Of Counsel
FOHRMAN, LURIE, HOLSTEIN,
SKLAR & COTTLE, LTD.
180 North Michigan Avenue
Chicago, Illinois 60601

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Petitioner, Chicago Health Clubs, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 2, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix, page A1) is reported at 567 F. 2d 331. The Decision and Order of the National Labor Relations Board ("the Board"), (Appendix, page A17) is reported at 226 NLRB No. 178 (1976). The Decision and Direction of Election of the Regional Director (Appendix, page A30) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit enforcing the order of the Board was entered on December 2, 1977. The Company's timely petition for rehearing and suggestion for rehearing *en banc* (Appendix, page A42) was denied on December 28, 1977 (Appendix, page A53). The denial was vacated (Appendix, page A54) on December 30, 1977. The petition was finally denied (Appendix, page A55) on January 6, 1978. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Is the Board correct in adopting the rule that a single store of a centrally administered, geographically concentrated retail chain is a presumptively appropriate bargaining unit without considering the disruptive effect of piecemeal organization and bargaining on the employer?

STATUTE INVOLVED

National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* (Sections 8(a)1, 8(a)5, and 9(b) (Appendix, page A56).

STATEMENT OF THE CASE

1. Facts

Chicago Health Clubs, Inc. ("the Company"), operates sixteen essentially similar health clubs in the Chicago metropolitan area. All sixteen clubs are located within a twenty-eight mile radius of the Company's administrative office, located in the Chicago central business district. The Retail Clerks International Association ("the Union") sought to represent the Company's employees working at one of these sixteen facilities located in

Schaumburg, Illinois, a Chicago suburb, and filed a Petition for a Representation Election with the Regional Director for Region Thirteen. The Company contended that the only appropriate unit was its sixteen clubs, which is a recognized and established administrative unit of the Company. There is centralized control for the sixteen clubs with respect to the subjects of collective bargaining, *i.e.*, wages, hours, general working conditions. All sixteen clubs are subject to detailed daily supervision by area supervisors. Further, during the eleven month period preceding the filing of this Petition, permanent and temporary employee transfers between the Schaumburg Club and the other fifteen clubs equaled at least 56% of the number of Schaumburg Club bargaining unit jobs.[1] Despite these facts, the Regional Director found the Schaumburg Club to be an appropriate unit for bargaining purposes.

2. Board Proceedings

The Regional Director's unit determination was based upon his finding that the Company had not presented sufficient evidence to rebut the presumption that a single store unit in a multi-store retail chain is an appropriate unit. The rule that a single store of a multi-store retail chain is presumptively appropriate was established by the Board in *Haag Drug Co., Inc.*, 169 NLRB 877 (1968). In establishing this presumption test, the Board expressly stated that the employer's interest in avoiding piecemeal organization and bargaining was irrelevant. *Haag, supra,* 169 NLRB at 878.

The Board denied the Company's request for review of the Regional Director's Decision and Direction of Election in the

1. The Company took the position that the percent of employee interchange was higher than the 56% as found by the Regional Director. In contrast to both the Company's position and the Regional Director's finding, however, the Court of Appeals inexplicably concluded that the interchange was "minimal". *N. L. R. B. v. Chicago Health Clubs, Inc.*, 567 F. 2d 331 at 339 (7th Cir. 1977).

instant case. However, one member of the three member panel dissented. An election was held and the Union received a majority of the votes cast. In order to have this matter reviewed by the Court of Appeals the Company refused to bargain with the Union. When unfair labor practice charges were filed for refusing to bargain, the Company stipulated with the Board that the only issue involved was the correctness of the Regional Director's unit determination and the application of the presumption test.[2]

3. The Court of Appeals Decision

The Court of Appeals (Swygert and Bauer, Circuit Judges, and Campbell, Senior District Judge) enforced the Board's order that the Company bargain with the Union.

REASONS FOR GRANTING THE WRIT

1. The Courts of Appeals Are in Disagreement Concerning the Board's Use of a Presumption Test That a Single Store Unit in a Multi-Store Retail Operation Is an Appropriate Unit for Bargaining Purposes.

The United States Court of Appeals for the First Circuit, in *N. L. R. B.* v. *Purity Foods*, 376 F. 2d 497 *cert. denied*, 289 U. S. 959 (1st Cir. 1967), refused to sanction the Board's application of a presumption test, where the employer operated a chain of seven supermarkets, all within a thirty mile radius of the employer's central office. The court said:

> "The Board's simple declaration that single store units are considered 'presumptively appropriate' adds nothing, especially since the Board declared as recently as 1963 that 'the appropriate bargaining unit in retail chain operations should embrace the employees of all stores within an

2. There is no procedure for directly reviewing unit determinations in the courts. It is only after an election and a refusal to bargain that the unit question can be reviewed through an application for enforcement by the Board or a petition to review filed by an aggrieved party.

> employer's administrative or geographical area'." 376 F. 2d at 501.

Instead, the First Circuit applies a "balancing of interests" test without the application of a presumption.

The United States Court of Appeals for the Second Circuit has adopted this flexible balancing of interest test. In *Continental Ins. Co.* v. *N. L. R. B.*, 409 F. 2d 727 (2d Cir. 1969), it said:

> ". . . we are not unmindful of the difficulties involved in making unit determinations that, on the one hand, effect the policy of the Act to assure employees the fullest freedom in exercising their rights and, on the other hand, respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations. *Each case necessarily requires a balancing of the interests of employer and employees.*" (Emphasis added.) 409 F. 2d at 728.

See also *N. L. R. B.* v. *Solis Theatre Corp.*, 403 F. 2d 381 (2d Cir. 1968); *Szabo Food Services, Inc.* v. *N. L. R. B.*, 550 F. 2d 705 (2d Cir. 1976).

The United States Court of Appeals for the Fifth and Sixth Circuits also reject the presumption test established by the Board, and instead, apply this "balancing of interests" test. See *N. L. R. B.* v. *Davis Cafeteria*, 396 F. 2d 18 (5th Cir. 1968); *N. L. R. B.* v. *Pinkerton's*, 428 F. 2d 479 (6th Cir. 1970); *Wayne Oakland Bank* v. *N. L. R. B.*, 462 F. 2d 666 (6th Cir. 1972).

The Sixth Circuit, in adopting the balancing of interests test, specifically considers "the extent of disruptive effect" on the employer "of piecemeal organization." *N. L. R. B.* v. *Pinkerton's, supra* at 485.

The United States Court of Appeals for the Seventh Circuit established the balancing of interests test in *N. L. R. B.* v. *Frisch's Big Boy Ill-Mar Inc.*, 356 F. 2d 895 (7th Cir. 1966), where it rejected the Board's finding that one restaurant of an eleven store chain was appropriate. However, in a turnabout in the last year, the same Court appears to have rejected the bal-

ancing of interest approach in favor of the Board's presumption test. In *Walgreen Drug Co.* v. *N. L. R. B.*, 564 F. 2d 751 (7th Cir. 1977), the Court, enforcing eight separate bargaining orders for eight separate store units of an 124 store Chicago chain, said:

> "In deciding unit determination cases involving multi-store retail chain employers, the Board has adopted the view that a single store is 'presumptively an appropriate unit for bargaining'." (Citing *Haag, supra.*) 564 F. 2d at 753.

It followed this test in the instant case as well as in *Walgreen*. See *N. L. R. B.* v. *Chicago Health Clubs, Inc.*, 567 F. 2d 331 at 335 (7th Cir. 1977).[3] Thus, the Seventh Circuit, in approving the presumption test, has rejected the balancing of interests test and, with it, consideration of the impact of piecemeal organization and bargaining in a centrally administered, geopraphically concentrated retail chain. It is clear that had the facts in this case been presented to panels in the First, Second, Fifth and Sixth Circuits, the outcome would have been different.[4]

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3. There are additional differences between the Seventh and other Circuits. Most circuit courts consider the lack of bargaining history as a neutral factor in determining unit appropriateness. See, *e.g., N. L. R. B.* v. *Adams Drug Co.*, 414 F. 2d 1194 at 1202 n.17. (D. C. Cir. 1969). In the Seventh Circuit, the lack of bargaining history is apparently considered material in supporting the presumption in favor of a single store unit. *N. L. R. B.* v. *Chicago Health Clubs, supra*, 567 F. 2d at 339. Also, while most circuits distinguish between the local store manager's ministerial functions (*i.e.*, hiring and firing within company set parameters) on the one hand and control over the subject of collective bargaining on the other, treating the former as not being material to the unit question, the Seventh Circuit considers the ministerial functions of the local managers a crucial element in determining whether the Board's presumption has been rebutted. Contrast *Wayne-Oakland Bank* v. *N. L. R. B., supra*, 462 F. 2d at 669 with *N. L. R. B.* v. *Chicago Health Clubs, supra*, 567 F. 2d at 340.

4. Ironically, the leading case on which the decisions in the United States Courts of Appeals for the First, Second, Fifth and Sixth Circuits rely is the 1966 Seventh Circuit decision in *Frisch's Big Boy Ill-Mar, Inc., supra.* In its decision in *Haag Drug Co., supra*, the Board specifically noted that the presumption test was in conflict with the Seventh Circuit's opinion in *Frisch's*. 169 NLRB at 879.

2. The Presumption Test Adopted by the Board and Followed by the United States Court of Appeals for the Seventh Circuit Is Inconsistent with the Principles to Be Used for Deciding Unit Questions Announced by the Supreme Court of the United States.

In *Packard Co.* v. *N. L. R. B.*, 330 U. S. 485 (1947), the Court said:

> "the issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute *and none should be by decision.*" (Emphasis added.) 330 U. S. at 491.

Further, in *N. L. R. B.* v. *Metropolitan Life Insurance Company*, 380 U. S. 438 (1965), in an opinion by Justice Goldberg, the Court rejected the idea that there are "controlling factors" for which justification is unnecessary in making bargaining unit determinations. It said:

> ". . . in light of the inarticulated bases of decision, *and what appeared to be inconsistent determinations approving units requested by the union* . . . the only conclusion that it could reach was that the Board has made the extent of organization the controlling factor . . . (Emphasis added.) 380 U. S. at 442.

The adoption by the Board and by the Court of Appeals for the Seventh Circuit of the presumption test establishes the very kind of absolute rule against which the Supreme Court riled in *Packard*. Further, the presumption test allows the Board to avoid explaining the bases for its decisions which was condemned by the Court in *Metropolitan Life*.

3. The Unit Question for Retail Chains Is a Significant and Recurring Issue Before the Board, Its Various Regions, and the United States Courts of Appeals Largely Because of the Board's Own Inconsistent and Fluctuating Determinations in This Area.

Recent Board decisions in this area indicate that Regional Directors apply the presumption test differently and that the Board is, at the least, uncertain as to what factors will rebut the presumption. Compare *Kirlin's Inc.*, 227 NLRB No. 174 (1977) with *Razco, Inc., d/b/a Hit'n Run Food Stores*, 227 NLRB No. 77 (1977).[5]

The decision of the Board in the instant case is but another example of this confusing chain of decisions. The court below, while enforcing the Board's order, nonetheless, pointed out the Board's inconsistencies:

> "Some decisions seem impossible to reconcile. For example, in two cases decided within two months of each other, the Board came down with completely different results even though both cases arose from the same geographic area and both cases involved retail drugstore chains having highly centralized operations. Compare *Walgreen Co.*, 198 NLRB 1138 (Aug. 30, 1972) (single store appropriate), with *Gray Drug Stores, Inc.*, 197 NLRB 924 (June 26, 1972) (single store inappropriate)." 567 F. 2d at 336 n. 8.

5. In *Kirlin's Inc.*, 227 NLRB No. 174 (1977) the Board found a six store chain appropriate, reversing a Regional Director's finding that a single store was appropriate. The two member Board majority found the one store not appropriate despite some substantial geographic separation between stores and the store managers' authority to recommend the hiring and firing of employees and to use independent judgment to determine employees' hours. 94 LRRM at 1322.

Razco, Inc., d/b/a Hit'n Run Food Stores, 227 NLRB No. 77 (1977) appears on its basic facts to be similar to *Kirlin's, Inc., supra*, yet the opposite result was reached by both the Regional Director and the Board. In *Razco*, the Regional Director was satisfied that employer had rebutted the presumption of single store appropriateness. The Board, before the same members as in *Kirlin*, reversed. One is hard pressed to explain the conflicting result in these two cases.

Moreover, the Board, over the years, itself has vacillated from a presumption in favor of an area-wide unit to its current position.[6]

There are thousands of retail chains operating in metropolitan areas with millions of employees affected by this issue. Given the Board's checkered history, in terms of both the principles it applies in determining appropriate units for multi-store retail chains as well as the inconsistencies in individual decisions by the Board and the Courts, it is no wonder, then, that the amount of litigation in this area is large. By hearing this case and resolving the issue raised, this Court should be able to reduce this needless time-consuming and costly litigation and provide some certainty in an area where little has existed in the past.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that its petition be granted.

Respectfully submitted,

MICHAEL L. SKLAR
MARTIN J. DUBOWSKY
180 North Michigan Avenue
Chicago, Illinois 60601
(312) 641-5252
Attorneys for Petitioner

Of Counsel:
FOHRMAN, LURIE, HOLSTEIN,
SKLAR & COTTLE, LTD.
180 North Michigan Avenue
Chicago, Illinois 60601

6. For a well-articulated history of the Board's fluctuating decisions in this area, see footnotes 7 and 8 in the Court of Appeals opinion below. (Appendix, *infra*, page A6)

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APPENDIX

UNITED STATES COURT OF APPEALS
Seventh Circuit.

Nos. 77-1227, 77-1504.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CHICAGO HEALTH & TENNIS CLUBS, INC.,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAXON PAINT & HOME CARE CENTERS, INC.,
Respondent.

Argued Oct. 26, 1977.
Decided Dec. 2, 1977.

REHEARING AND REHEARING IN BANC DENIED IN NO. 77-1227 JAN. 6, 1978.

Before SWYGERT and BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.[1]

1. The Honorable William J. Campbell, United States Senior District Judge for the Northern District of Illinois, is sitting by designation.

SWYGERT, *Circuit Judge.*

In the two cases before us, the National Labor Relations Board ("the Board") petitions for enforcement of its orders directing each of the respondents to cease and desist from refusing to bargain collectively with the union which had been certified as the exclusive bargaining representative.[2] These two cases have been consolidated for this opinion because they present the identical legal issue: whether the Board abused its discretion in certifying a single retail store as an appropriate unit for collective bargaining where such store constitutes only one of a chain of stores owned and operated by the company in the Chicago metropolitan area. For the reasons set forth, we grant the petition in *Chicago Health Clubs* and deny enforcement in *Saxon Paint.*

I

(A) *Parties*

No. 77-1227. Chicago Health & Tennis Clubs is an Illinois corporation engaged in the sale of club memberships and providing services of exercise training and weight loss counseling for its members. It operates sixteen clubs in the Chicago metropolitan area (Chicago and suburbs). Its central office is located in Chicago's central business district and all clubs are within a 28-mile radius of this office.

No. 77-1504. Saxon Paint & Home Care Centers is an Illinois corporation engaged in the retail sale of paint, wallpaper, and home decorating supplies. It owns and operates twenty-one stores in the Chicago metropolitan area (Cook County). In addition, Saxon has seven other stores in Illinois, Indiana, and Wisconsin. Although these seven stores are operated by separate corporate entities, they are owned in part by the same stockholders and are operated through a single managerial hierarchy. All of the Chicago metropolitan area stores are within a 30-mile radius of each other.

2. This court's jurisdiction is based on section 10(e) of the National Labor Relations Act, 29 U. S. C. §§ 151 *et seq.*

(B) *Procedural History*

The procedural history of the two cases is similar and therefore a single description suffices. The proceeding began when the Retail Clerks Union, Retail Clerks International Association, AFL-CIO-CLC[3] filed a petition for representation seeking a unit limited to the employees of a single store in the company's chain. The company opposed the petition, contending that the only appropriate unit could consist of all its employees working in all its chain stores in the Chicago metropolitan area. Following a hearing, the Regional Director found that a single store constituted an appropriate bargaining unit. The Board denied the company's request for a review of the Director's decision.[4]

An election was held in which a majority of the employees designated the Retail Clerks Union as their collective bargaining agent. The Director certified the union as the exclusive bargaining representative and shortly thereafter the union requested the company to bargain. The company refused on the ground that the unit found by the Board was inappropriate. The union then filed an unfair labor practice charge, alleging an unlawful refusal to bargain. Complaints issued and in its answer the company admitted its refusal to bargain, reasserting the inappropriateness of the designated unit.

The Board granted the General Counsel's motion for summary judgment,[5] finding that each company violated section 8(a)(1) and (a)(5) of the Act by refusing to recognize and

3. Although the same union was involved in each case, *Saxon* involved Local 1504, and *Chicago Health Clubs* involved Local 1540.

4. In *Saxon,* one of the three board members, Peter D. Walther, dissented without opinion.

5. *See Saxon Paint & Home Care Centers, Inc.,* 228 N. L. R. B. No. 15 (Feb. 8, 1977); *Chicago Health & Tennis Clubs, Inc.,* 226 N. L. R. B. No. 178 (Nov. 29, 1976). Board member Peter D. Walther dissented in both cases.

bargain with the union.[6] On these two petitions for enforcement, each company reasserts its challenge to the unit determination. Since the companies defend solely on the grounds that the unit determinations were inappropriate, and since they concede that they refused to bargain, it is undisputed that the companies violated section 8(a)(1) and (a)(5) of the Act if the Board's unit determination were correct. See *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895, 897 (7th Cir. 1966).

II

The primary responsibility for determining the appropriateness of a unit for collective bargaining rests with the Board. It is given broad discretion in determining bargaining units "to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act]." 29 U. S. C. § 159(b). The Board is not required to select the most appropriate bargaining unit in a given factual situation; it need choose only an appropriate unit within the range of appropriate units. *Wil-Kil Pest Control Co.* v. *NLRB*, 440 F. 2d 371, 375 (7th Cir. 1971). It follows that Board unit determinations are rarely to be disturbed. *South Prairie Construction Co.* v. *Local No. 627, International Union*, 425 U. S. 800, 805, 96 S.Ct. 842, 48 L. Ed. 2d 382 (1976); *Packard Motor Co.* v. *NLRB*, 330 U. S. 485, 491, 67 S. Ct. 789, 91 L. Ed. 2d 1040 (1947).

Although Board determinations are subject to limited review, they are not immune from judicial scrutiny. We must bear in mind that section 10(e) of the Act clothes the courts of appeals

6. Section 8(a) of the Act (29 U. S. C. § 158(a)) provides in relevant part:

(a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

with authority to enter decrees "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." 29 U. S. C. § 160(e). Indeed, the Supreme Court has held that we are not " 'to stand aside and rubber-stamp' Board determinations that run contrary to the language or tenor of the Act." *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 256, 95 S. Ct. 959, 968, 43 L. Ed. 2d 171 (1975); *NLRB* v. *Brown*, 380 U. S. 278, 291, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965). Accordingly, we have the responsibility of determining whether the Board's unit determinations were unreasonable, *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517, 521 (7th Cir. 1967), *cert. denied*, 389 U. S. 1041, 88 S. Ct. 780, 19 L. Ed. 831 (1968), arbitrarily or capriciously made, *State Farm Mutual Automobile Insurance Co.* v. *NLRB*, 411 F. 2d 356, 358 (7th Cir.) *(en banc), cert. denied*, 396 U. S. 832, 90 S. Ct. 87, 24 L. Ed. 2d 83 (1969), or unsupported by substantial evidence, *NLRB* v. *Pinkerton's Inc.*, 416 F. 2d 627, 630 (7th Cir. 1969).

In making unit determinations, the Board must effect the policy of the Act to assure employees the fullest freedom in exercising their rights, yet at the same time "respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations." *NLRB* v. *Solis Theatre Corp.*, 403 F. 2d 381, 382 (2d Cir. 1968). See *Szabo Food Services, Inc.* v. *NLRB*, 550 F. 2d 705, 709 (2d Cir. 1976); *NLRB* v. *Pinkerton's Inc.*, 428 F. 2d 479, 485 (6th Cir. 1970). In reaching its decision, the Board considers several criteria, no single factor alone being determinative. *State Farm Mutual*, 411 F. 2d at 358. These factors include:

(a) geographic proximity of the stores in relation to each other, *NLRB* v. *Kostel Corp.*, 440 F. 2d 347 (7th Cir. 1971); *Wil-Kil Pest Control Co.* v. *NLRB*, 440 F. 2d 371 (7th Cir. 1971);

(b) history of collective bargaining or unionization, *Kostel Corp., supra; State Farm Mutual, supra;*

(c) extent of employee interchange between various stores, *Walgreen Co.* v. *NLRB*, 564 F. 2d 751 (7th Cir. 1977); *NLRB* v. *Pinkerton's Inc.*, 416 F. 2d 627 (7th Cir. 1969);

(d) functional integration of operations, *State Farm Mutual, supra; NLRB* v. *Brisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966); and

(e) centralization of management, particularly in regard to central control of personnel and labor relations. *Walgreen Co., supra; Wil-Kil Pest Control, supra; Frisch's Big Boy, supra.*

As the geographic proximity of the stores in the two cases before us is almost identical, our decision whether to grant the petitions for enforcement must rest on an analysis of the other factors.

One further item deserves note before proceeding to a discussion of the individual cases. Although the Board has vascillated in deciding the proper scope of a bargaining unit in the retail chain industry,[7] it has apparently now adopted the admin-

7. The Board's unit determinations in regard to multistore retail operations has fluctuated from one extreme to another. Before enactment of the Taft-Hartley Act in 1947, the Board regularly approved single retail chainstore bargaining units. *See, e.g., Koppers Stores,* 73 N. L. R. B. 504 (1947). Sometime after the Taft-Hartley Act, however, the Board developed a virtual presumption against the appropriateness of single-store units. For example, in *Safeway Stores, Inc.*, 96 N. L. R. B. 998, 1000 (1951), the Board stated:

> [A]bsent unusual circumstances, the appropriate collective bargaining unit in the retail . . . trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or [geographic] area.

See also Weis Markets, Inc., 142 N. L. R. B. 708, 710 (1963); *Daw Drug Co.*, 127 N. L. R. B. 1316 (1960); *Crown Drug Co.*, 108 N. L. R. B. 1126 (1954).

The presumption encompassing all retail stores within a geographic or administrative area was discarded in 1962 when the Board announced that thereafter it would "apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general." *Sav-On Drugs, Inc.*, 138 N. L. R. B. 1032, 1033 (1962). Two years later, in a complete reversal of its policy articulated in *Safeway*, the Board held that the single unit is "presumptively appro-

(Footnote continued on next page.)

istrative policy that a single store is "presumptively an appropriate unit for bargaining." *Haag Drug Corp.*, 169 N. L. R. B. 877-78 (1968).[8] That presumption, however, is not conclusive and "may be overcome where factors are present in a particular case which would counter the appropriateness of a single store unit. . . ." *Id.* at 878.

We turn now to the two cases before us.

(A) *Saxon Paint, No. 77-1504*

Although the Board recognized that the Chicago area Saxon stores exhibited "a high degree of centralized administration," it nevertheless found a single store unit appropriate. In large part, the Board based its unit determination on the role of the local store manager, adopting the Regional Director's finding that "substantial responsibility is invested in the Employer's store managers." We believe that the Board exaggerated the control exercised by the store manager over labor and administrative matters and hold that the Board's finding that the store manager posseses autonomy and authority is not supported by substantial evidence.

(Footnote continued from preceding page.)

priate unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity." *Frisch's Big Boy Ill-Mar, Inc.*, 147 N. L. R. B. 551 n. 1 (1964), *enforcement denied*, 356 F. 2d 895 (7th Cir. 1966). *See Haag Drug Co.*, 169 N. L. R. B. 877 (1968).

8. Several Board decisions since 1968 suggest, however, a weakening of the presumptive appropriateness of single store units. *See, e.g., Kirlin's Inc. of Central Illinois*, 227 N. L. R. B. No. 174 (1977); *Twenty-First Century Restaurant Corp.*, 192 N. L. R. B. 881 (1971); *Waiakamilo Corp. d/b/a McDonald's*, 192 N. L. R. B. 878 (1971); *The Pep Boys—Manny, Moe & Jack*, 172 N. L. R. B. 246 (1968). Some decisions seem impossible to reconcile. For example, in two cases decided within two months of each other, the Board came down with completely different results even though both cases arose from the same geographic area and both cases involved retail drugstore chains having highly centralized operations. *Compare Walgreen Co.*, 198 N. L. R. B. 1138 (Aug. 30, 1972) (single store appropriate), *with Gray Drug Stores, Inc.*, 197 N. L. R. B. 924 (June 26, 1972) (single store inappropriate).

The evidence in the record clearly establishes that Saxon is a highly integrated operation. Each Saxon store is similar in all respects to each of the other Saxon stores in Cook County. All of the stores are open on the same days and at the same times. They sell the same merchandise at the same price and the physical layout of each store is similar. Special sales and promotions are held at the same time in each store with the same sale prices being charged. Advertising covers the entire metropolitan area and is prepared by headquarters as are store signs and window displays. The stores are "as much alike in this respect as peas in a pod." *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895, 896 (7th Cir. 1966).

Personnel and labor relations policies for the Saxon stores are also centrally administered, being formulated by the personnel director who maintains his office at corporate headquarters. Payrolls, accounts, personnel files, and other records are maintained at the general office. Employee job classifications are the same at each store, and employees within a particular classification perform the same duties and are required to have the same skills and experience. Employees within the same classification, experience, and seniority receive the same wages. A uniform fringe benefit program is maintained at each store, and store employees enjoy company-wide seniority.

The actual operations of the Cook County stores are also highly centralized. Under the vice president of operations are three district managers who are responsible for assuring that all stores within their respective districts are being operated in full compliance with the policies and procedures formulated at headquarters, including personnel and labor relations policies. These district managers visit the stores within their district on the average of every two days and maintain further contact with the individual stores through frequent telephone calls and written memoranda. In addition, the company maintains a messenger service which visits each metropolitan area store daily.

At the store level and below the district managers, the company employs fourteen store managers in all three districts. Seven of these managers are assigned to single stores, the remaining seven managers are each assigned to two stores. The evidence establishes that, contrary to the Board's conclusion, these store managers have limited involvement in the store's non-labor business activities. The individual store managers have no authority to commit the employer's credit, purchase or order merchandise and supplies, arrange for repair or maintenance work, change prices, or resolve customer complaints. At best it can be said that it is the responsibility of the store managers to implement the company's policies and procedures within the individual stores.

The store managers' involvement in labor relations and personnel matters is also severely limited. They have no authority to do any of the following: (a) hire new employees; (b) grant promotions, wage increases or changes in job classifications; (c) discharge or suspend employees for disciplinary reasons; (d) lay-off employees; (e) handle employee grievances; (f) grant requests for vacations or leaves of absence; (g) permanently or temporarily transfer employees between anv of the stores; and (h) post the weekly work schedule without prior approval by the district manager. While the store manager may offer recommendations in certain of these areas, the record shows that these recommendations, even in such key areas as employee discharge, may not be followed. Furthermore, in certain areas such as promotion and wage increases, the store manager may not even be consulted before a decision is made. As the Second Circuit noted in *NLRB* v. *Solis Theatre Corp.*, 403 F. 2d 381, 383 (2d Cir. 1968):

> It appears, therefore, that instead of being in a decision making position, the "manager" has little or no authority on labor policy but is subject to detailed instructions from the central office.

That Saxon is completely integrated functionally is best illustrated by its hiring and training practices. Hiring is done almost

exclusively through the corporate offices. Job applications are taken and interviews are held at the personnel office.[9] The store manager may interview an applicant only after the applicant has first interviewed with the personnel director and then the district manager. Applicants may be rejected and new employees hired, however, without prior consultation with or participation by the store manager.

Similarly, the training of new employees comes under the primary jurisdiction of the central personnel department. The company issues manuals to all new employees and provides them with formal training, lasting from one to two weeks, at its corporate headquarters. In sum, it is apparent that there is no local autonomy among the individual stores and that the store managers lack the authority to resolve issues which would be subject to collective bargaining. *See Frisch's Big Boy*, 356 F. 2d at 897.

That Saxon's business is both centralized and integrated and that the individual stores lack meaningful identity as a self-contained unit is further supported by the numbers of employee transfers, both temporary and permanent, among the metropolitan area stores. During a thirteen month period and discounting employees not covered in the unit,[10] eighteen percent of all employees were transferred permanently among the Chicago stores. Additional testimony showed that temporary transfers frequently occur, almost on a daily basis.[11] While this alone may

9. Applications may be taken at the individual stores, but this is the exception rather than the rule. Moreover, even though the store manager may conduct a preliminary interview in such cases, the applicant must still be screened and interviewed at headquarters.

10. Primarily excluded were store managers. Including store managers, over twenty-five percent of all employees were permanently transferred during the thirteen-month period.

11. The Regional Director refused to consider the temporary transfers because the company did not come forward with specific data on the frequency of such transfers. The uncontradicted testimony was that, because of the proximity of the stores and because the jobs in the different stores are identical, temporary transfers

(Footnote continued on next page.)

be insufficient to negate a single store unit, we cannot agree with the Board's finding that "the degree of employee interchange [was] too inconsequential and insubstantial to rebut the appropriateness of a single store unit," particularly when this factor is considered in light of all of the other factors.

That a single store is inappropriate here is further shown by the history of collective bargaining. The pattern of unionization both at stores in other regions and at stores within the Chicago metropolitan area has always been district wide. Since 1966, the employees at the company's two Hammond, Indiana stores have been represented by another local of the Retail Clerks Union. These employees are covered by one collective bargaining agreement between the union and the company. Both present and past agreements have stated that the unit it covers is "all present and future retail establishments of the Company situated within the Gary, Indiana metropolitan area, including the County of Lake." A similar clause was contained in the agreement with the employees from the company's store in Rockford, Illinois.[12]

The record also reveals that the Retail Clerks Union once petitioned the Board for a representation election among all of

(Footnote continued from preceding page.)

occur almost daily. The company explained the lack of more specific evidence as follows:

> [There are] so many of them [temporary transfers]. We would not have really any place to store the amount of paper work that would be required to keep track of those [temporary transfers].

We believe that while the Regional Director could have discounted the weight of the testimony because of its lack of specificity, it could not completely ignore such testimony when it stood unrefuted.

12. Prior to the union's decertification in 1975, the employees at the Rockford store were covered by a collective bargaining agreement which described the covered unit as "all present and future retail establishments of the Employer situated within the Rockford, Illinois metropolitan area, including the counties of Winnebago, Boone, Stephenson & Joe Daviess." While the company had only one store in that geographic area at that time, it is noteworthy that the union wanted to represent all of the company's employees within the metropolitan area.

the company's Chicago metropolitan area stores. An election was conducted in 1965 among the then existing five Saxon stores. A second election, held in 1967, also included a sixth Saxon store which was opened during the intervening period of time.[13] We agree that this bargaining history is not controlling because the elections were conducted pursuant to an agreement between the union and the company. But we cannot agree that this history is entitled to little or no weight for, at a minimum, it shows that the union previously considered and treated all of the company's stores in the Chicago metropolitan area as a single unit.

The Board argues that the instant case is controlled by this court's recent decision in *Walgreen Co.* v. *NLRB*, 564 F. 2d 751 (7th Cir. 1977), which held that a single store in a chain of drug stores within the Chicago metropolitan area was an appropriate unit. We are not persuaded the Board's order should be enforced on the basis of *Walgreen* for it is distinguishable both in the absence of bargaining history and in the amount of autonomy exercised by the store manager. In *Walgreen*, the district managers supervised a larger number of stores and visited each store far less frequently than in the case at bar.[14] Furthermore, most of the personnel and labor related decisions such as hiring, firing, and promotions "were based on" the recommendations of the store manager. Thus the court found that much of the employment activities were supervised directly by the local store manager "without significant interference" by the central organization. We cannot say, with the particular facts

13. Employees from the Oak Lawn store, the store in question in this case, did not participate in these elections as the store had not opened at the time.

14. In *Walgreen*, eight district managers supervised 124 stores, a ratio of 1 to 15.5. This compares to the ratio of one to seven in this case. Furthermore, in *Walgreen*, the district managers visited each store from once every ten days to once every three and one-half weeks, as opposed to once every two days in the instant case.

before us, that the local store manager here operates "without significant interference" by the central office.[15]

The factual situation involved in this case is rather more analogous to that found in *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966). In *Frisch's*, this court refused to enforce a Board order finding a single store unit appropriate among ten restaurants in Indianapolis, Indiana. After reviewing the record, we found that the restaurants were a single, integrated enterprise and that each restaurant lacked sufficient autonomy, even though the individual restaurant manager could order supplies and merchandise and could independently hire employees within centrally prescribed wage rates. In finding a single store unit inappropriate, this court said:

> It is evident to us that the decisions left to the managers do not involve any significant elements of judgment as to employment relations.
>
> * * * * *
>
> It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining. 356 F. 2d at 897.

It would be an anomaly indeed to find a single store appropriate here when the store managers in this case have considerably less autonomy than the store managers in *Frisch's*.

For the reasons herein stated, we conclude that the Board's determination that a single Saxon store was an appropriate bargaining unit is not supported by substantial evidence and therefore is arbitrary and unreasonable. Accordingly, the Board's order is set aside and enforcement is denied.

15. The other cases from this circuit which have enforced the Board's order finding single store units appropriate are also distinguished by the degree of autonomy exercised by the local store manager. *See, e.g., Wil-Kil Pest Control Co.* v. *NLRB*, 440 F. 2d 371 (7th Cir. 1971); *NLRB* v. *Kostel Corp.*, 440 F. 2d 347 (7th Cir. 1971); *State Farm Mutual Automobile Insurance Co.* v. *NLRB*, 411 F. 2d 356 (7th Cir.) *(en banc), cert. denied*, 396 U. S. 832, 90 S. Ct. 87, 24 L. Ed. 2d 83 (1969).

(B) *Chicago Health Clubs, No. 77-1227*

Chicago Health Clubs is, at first sight, quite similar factually to *Saxon Paint*. The company's sixteen stores (clubs) are in a similar geographic proximity to each other. Many of its operations and procedures are centralized.

Other similarities are readily apparent. Chicago Health Clubs has two area supervisors (similar to Saxon's district managers) who oversee its sixteen clubs. These supervisors visit their respective clubs two or three times a week and maintain frequent telephone contact. Despite these similarities, we conclude that substantial evidence supports the Board's finding that a single club is an appropriate bargaining unit.

Notably absent in this case is any prior history of collective bargaining. In addition, the extent of employee interchange among the various clubs is minimal.[16] Furthermore, there are significant differences in the functional integration of the clubs, the extent to which the company is centralized, and the degree of autonomy of the local club managers.

Unlike the Saxon stores which are virtually identical with each other, Chicago Health Clubs operates at least three types of clubs. Some clubs exclusively serve women, others serve men on one day and women on another. Still others serve men and women on the same day. The clubs also differ in the type of facilities available. Some have handball courts, others have swimming pools. One has a tennis court.

Although many aspects of the company's operations and procedures are centralized, they are not as highly centralized as in *Saxon Paint*. For example, even though official personnel and payroll records are maintained at the central office, each club manager also maintains records detailing needed information

16. The record establishes that all employee transfers at the Schaumburg facility, the club in question, involved only sales trainees. Sales trainees constitute a small fraction of the unit employees. There is no evidence that any of the other unit employees such as instructors or attendants were ever transferred, whether permanently or temporarily, to or from the Schaumburg facility.

about the club employees. Similarly, the central office controls the advertising for all sixteen clubs, but the advertising may be directed at only one geographical area or may be on behalf of only one of the clubs.

Also unlike the store managers in *Saxon Paint,* the club managers exercise a marked degree of control over personnel and labor relations matters. Applicants apply at the individual clubs and are interviewed by the club manager without further interview by the area supervisor. Part-time employees, a large number if not a majority of all employees, are hired and fired by the club manager without consultation with the area supervisor. Although full-time employees are hired with the approval of the area supervisor, the decision is based on the applicant's interview with the club manager.[17] In hiring, the club manager sets the wage rate for new employees within the perimeters determined by the area supervisor.

Additionally, unlike the store managers in *Saxon Paint,* the club managers here exercise considerable disciplinary authority over rank-and-file employees. A club manager may reprimand employees without prior approval. Moreover, in extreme cases, the club manager has the authority to discharge or suspend employees without prior consultation with the area supervisor.

The club manager exercises control over the working conditions of employees in many other respects. For example, the club manager handles employee complaints and grievances about wages and hours, schedules vacations, grants or denies overtime, decides whether employees may take their lunch break on or off the premises, administers the local payroll system, and trains employees in exercise instruction and sales. Thus, unlike *Saxon Paint* and like *Walgreen,* much of the day-to-day employment activities are supervised directly by the local club manager "without significant interference" by the central corporate organization.

17. In one instance, the club manager hired an employee despite substantial concern expressed by the area supervisor.

Based on the autonomy of the club manager, the insubstantial amount of employee interchange among the metropolitan clubs, and the absence of any collective bargaining history, we conclude that the Board's determination that a single store was an appropriate bargaining unit is reasonable in light of all the facts presented in this case. Since Chicago Health Clubs has admitted its refusal to bargain with the union representing this single club, we accordingly enforce the Board's order.

In summary, the Board's order in No. 77-1227 shall be enforced. Enforcement of the Board's order in No. 77-1504 is denied.

MJW

226 NLRB No. 178

D—1655
Schaumburg, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO HEALTH & TENNIS CLUBS, INC.	Case 13—CA—15374
and	
RETAIL CLERKS UNION LOCAL 1540, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL—CIO	

DECISION AND ORDER

Upon a charge filed on April 27, 1976, and a first amended charge filed on May 20, 1976, by Retail Clerks Union Local 1540, Retail Clerks International Association, AFL—CIO, herein called the Union, and duly served on Chicago Health and Tennis Clubs, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on May 28, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 15, 1976, following a Board

election in Case 13—RC—13864 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 19, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. The complaint also alleges that Respondent made certain unilateral changes, as described below. On June 9, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Specifically, Respondent admitted that it unilaterally made changes with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the certified unit, in that it unilaterally changed existing vacation benefits and instituted new vacation benefits, instituted sick days, and instituted paid holidays. Respondent denied only that the unit as certified is an appropriate unit.

On June 16, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment.

Subsequently, on June 28, 1976, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause Why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

1. Official notice is taken of the record in the representation proceeding, Case 13—RC—13864, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F. 2d 683 (C. A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F. 2d 26 (C. A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F. 2d 91 (C. A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice to Show Cause, Respondent attacks the Union's certification on the basis of the appropriateness of the unit.

Review of the record herein reveals that, pursuant to a Decision and Direction of Election in Case 13—RC—13864,[2] an election was held on April 7, 1976, which the Union won. Following a request by the Union that the Respondent bargain collectively in good faith with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment, the Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the certified bargaining unit, and the Respondent made unilateral changes in rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent admitted that its refusal to bargain was for the purpose of testing the Union's certification. Respondent admitted also that it instituted unilateral changes in certain terms and conditions of employment.

In response to a Motion for Summary Judgment, an adverse party may not rest upon denials in its pleadings, but must present specific facts which demonstrate that there are material facts in issue which require a hearing.[3] Respondent in the instant case presented no material issues or facts not admitted or previously determined. It is well settled that in the absence of newly dis-

2. On April 5, 1976, by direction of the Board, the Respondent's request for review of the Regional Director's Decision and Direction of Election was denied as it raised no substantial issues warranting review.

3. *Western Electric Company*, 198 NLRB 623 (1972).

covered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does its allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. *The Business of the Respondent*

The Respondent operates 13 health clubs in the Chicago metropolitan area, including the Schaumburg facility, all of which are basically similar in their operations. Health & Tennis Corporation of America (HTCA) is the sole stockholder of Chicago Health Club Fair Lady, Inc. (Fair Lady), which operates three health clubs in the Chicago metropolitan area. In addition to the Respondent and Fair Lady, HTCA owns approximately 20 other similar subsidiaries across the country, operating a total of 88 health clubs.

The Respondent's central office is located at 230 West Monroe Street, Chicago, which is in Chicago's central business district. There are three other health clubs within the city of

4. See *Pittsburgh Plate Glass Co* v. *N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Chicago and one each in Schaumburg, Highland Park, Mount Prospect, Old Orchard (Skokie), Morton Grove, Park Ridge, Elmhurst, Oak Park, Oak Brook, LaGrange, Evergreen Park, and Glenwood, all in Illinois and in the Metropolitan Chicago area. The Schaumburg facility is 28 miles from the Monroe Street office.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. *The Labor Organization Involved*

Retail Clerks Union Local 1540, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Representation Prfoceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees, including sales trainees, floor supervisors, instructors, instructresses, locker room attendants, hygiene maintenance employees, receptionists, masseurs and masseuses at the Employer's facility, now located at 1020 Meacham Road, Schaumburg, Illinois; but excluding all club managers, assistant managers, area supervisors, assistant area supervisors, head tennis professional, professional employees, guards and supervisors as defined in the Act.

2. The certification

On April 7, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with the Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 15, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about April 19, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 19, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit. Furthermore, Respondent unilaterally made changes with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the certified unit.

Accordingly, we find that the Respondent has, since April 19, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Chicago Health & Tennis Clubs, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. We shall order that it cease and desist from making unilateral changes in the terms and conditions of employment, and that it, upon request, rescind any and all such unilateral changes made.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (C. A. 5, 1964), cert. denied 379 U. S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (C. A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Chicago Health and Tennis Clubs, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union Local 1540, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees, including sales trainees, floor supervisors, instructors, instructresses, locker room attendants, hygiene maintenance employees, receptionists, masseurs and masseuses at the Employer's facility, now located at 1020 Meacham Road, Schaumburg, Illinois; but excluding all club managers, assistant managers, area supervisors, assistant area supervisors, head tennis professional, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 15, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 19, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, empolyees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. By instituting unilateral changes with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment in the certified unit, without consultation with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.[5]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Chicago Health & Tennis Clubs, Inc., 1020 Meacham Road, Schaumburg, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Clerks Union Local 1540, Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees, including sales trainees, floor supervisors, instructors, instructresses, locker room attendants, hygiene maintenance employees, receptionists, masseurs and masseuses at the Employer's facility, located at 1020 Meacham Road, Schaumburg, Illinois; but excluding all club managers, assistant managers, area supervisors, assistant area supervisors, head tennis professional, professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing rates of pay, wages, hours of employment, and other terms and conditions of employment of the

5. Member Walther would deny the motion and dismiss the complaint herein on the ground that the single-store unit is inappropriate for collective bargaining.

employees in the certified unit, without consultation with the above-named labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, rescind any and all unilateral changes made with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and reinstate any and all such provisions with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as were in effect prior to Respondent's unilateral changes.

(b) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at 1020 Meacham Street, Schaumburg, Illinois, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 13 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

6. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington D. C. November 29, 1976.

BETTY SOUTHARD MURPHY,
Chairman

HOWARD JENKINS, JR.,
Member

PETER D. WALTHER,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Clerks Union Local 1540, Retail Clerks International Association, AFL—CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT institute unilateral changes with respect to rates of pay, wages, hours, and other terms and conditions of employment, without prior consultation with the above-named Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, rescind such unilateral changes already made, specifically unilateral changes made with respect to vacation benefits, sick days, and paid holidays, and we will reinstate any and all provisions relating to vacation benefits, sick days, and paid holidays which were in effect at the time of the unilateral changes.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time employees, including sales trainees, floor supervisors. instructors, instructresses,

locker room attendants, hygiene maintenance employees, receptionists, masseurs, and masseuses at the Employer's facility, located at 1020 Meacham Road, Schaumburg, Illinois; but excluding all club managers, assistant managers, area supervisors, assistant area supervisors, head tennis professional, professional employees, guards and supervisors as defined in the Act.

CHICAGO HEALTH & TENNIS CLUBS, INC.
(Employer)

Dated..... By.....
(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO HEALTH CLUBS, INC.[1] *Employer* and RETAIL CLERKS UNION, LOCAL 1540, CHARTERED BY RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO *Petitioner*	Case No. 13-RC-13864

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

---

1. The name of the Employer appears as amended at the hearing. During the course of the hearing, Chicago Health & Tennis Club, Inc., which operated the facility located in Schaumburg, Illinois, was merged into the Employer.

2. Briefs have been submitted by the parties herein and have been carefully considered.

3. At the hearing, the parties stipulated that Chicago Health & Tennis Club, Inc. is an Illinois corporation engaged in the sale of

(Footnote continued on next page.)

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

(Footnote continued from preceding page.)

club memberships and providing services of exercise training and weight loss counseling for its members.

4. The Employer operates 13 health clubs in the Chicago metropolitan area, including the Schaumburg facility, all of which are basically similar in their operations. Health & Tennis Corporation of America (HTCA) is the sole stockholder of Chicago Health Club Fair Lady, Inc. (Fair Lady) which operates three health clubs in the Chicago metropolitan area. In addition to the Employer and Fair Lady, HTCA owns approximately 20 other similar subsidiaries across the country, operating a total of 88 health clubs.

The Employer's central office is located at 230 West Monroe Street, Chicago, which is in Chicago's central business district, where one of the 16 area clubs (Europa) is also located. There are three other health clubs within the City of Chicago and one each in Schaumburg, Highland Park, Mount Prospect, Old Orchard (Skokie), Morton Grove, Park Ridge, Elmhurst, Oak Park, Oak Brook, La Grange, Evergreen Park and Glenwood, all in Illinois and in the metropolitan Chicago area. The closest club to the Monroe Street office is located at Marina City in Chicago, approximately 1 mile away. The most distant club is in Glenwood, which is approximately 28 miles from the Monroe Street office. The Schaumburg facility is 28 miles from the Monroe Street office. The closest club to the Schaumburg facility is 6½ miles away, while the most distant club to Schaumburg is in Glenwood, approximately 38 miles away.

Petitioner seeks to represent a unit limited to and comprised of all of the employees located at the Schaumburg facility, including assistant managers. Petitioner states that it will not participate in an election directed in any larger unit. The Employer contends that the smallest appropriate unit is one consisting of all 16 health clubs in the Chicago metropolitan area. Additionally, the Employer asserts that the assistant managers are supervisors within the meaning of the Act and therefore not properly includable in any bargaining unit found appropriate herein.

(Footnote continued on next page.)

All full-time and regular part-time employees, including sales trainees, floor supervisors, instructors, instructresses, locker room attendants, hygiene maintenance employees, receptionists, mas-

(Footnote continued from preceding page.)

The first issue to be determined is the appropriateness of the petitioned-for unit, a single club unit. Many aspects of the Employer's operations and procedures are centralized. The central office on Monroe Street in Chicago thus maintains the employees' official personnel records and payroll records, although each club manager generally does maintain some kind of informal record detailing the needed information about the club employees. The central office controls the advertising for all 16 clubs, although on occasion, for special events, advertising may be directed solely at one geographical area or may be for only one of the clubs. It also controls and processes the customers' sales contracts, including the membership costs, customer complaints, all forms used by the clubs, health and physical fitness training classes, equipment rental and purchase for all locations and equipment repair and maintenance. As to maintenance, the Employer employs a group of repairmen who visit all the clubs to maintain and repair the equipment. They are paid by the Employer without regard to which club utilizes their services. The Employer has two area supervisors who, with their assistants, supervise all the clubs in the metropolitan area. These supervisors have established uniform dress for the employees, multi-facility sales training classes, uniform wage ranges for all classifications of employees, the staffing perimeters for each classification of employees at each facility, the hours of operation for each of the 16 clubs, and uniform benefits for employees such as health and accident insurance policy and vacations.

The Employer's club at Schaumburg opened for operation on November 15, 1974. At that time, the Employer had a 3-day grand opening promotion at the Schaumburg facility, bringing in various personnel from most of the other clubs in the area and some personnel from clubs outside of the Chicago metropolitan area. The managers, assistant manager, area supervisors and their assistants had no other duties but to attempt to sell memberships to those individuals who came to the club for an inspection tour of its facilities. Additionally, a number of instructors and instructresses were transferred from other clubs to the Schaumburg club during this 3-day period, and charged with the responsibility of giving tours to the customers, thereby allowing the other personnel on the premises more time for selling. On March 22 and 23, 1975, the Employer promoted another special event at the Schaumburg club for the purpose of attracting additional members. Again, as during the grand opening promotion, various individuals in various classifications were transferred to the Schaumburg facility for the promotion. Although the Employer contends that these temporary transfers must be con-

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seurs and masseuses at the Employer's facility, now located at 1020 Meacham Road, Schaumburg, Illinois; but excluding all club managers, assistant managers, area supervisors, assistant

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sidered when determining the amount of interchange between the Schaumburg facility and the other 15 clubs, I do not consider it appropriate to do so in considering community of interest between the unit employees at the Schaumburg club and the employees in similar classifications at the other 15 clubs. It is clear that the instructors and instructresses who were temporarily transferred were not performing duties consistent with their classifications, but, rather, were acting solely as tour guides which is a minimal part of their normal duties.

It has been stipulated that the area supervisors, their assistants and the club managers are supervisors within the meaning of the Act. Based upon that stipulation and the record herein, I find that the area supervisors, the assistant area supervisors and the club managers are supervisors within the meaning of the Act and therefore, not includable within the bargaining unit found appropriate herein. Therefore, the fact that the area supervisors, assistant area supervisors and club managers were working at the Schaumburg club during these promotions, and at other times, has no effect on the determination of the amount of interchange within the bargaining unit. Furthermore, as I have determined, *infra,* that the assistant managers are supervisors within the meaning of the Act, the amount of interchange among individuals of that classification also has no effect on the unit determination nor does it have any impact on the community of interest which might exist between unit employees at the Schaumburg club and similar employees at the Employer's other clubs.

The Employer submitted Employer's Exhibit No. 8, which was received into evidence in order to establish evidence of interchange among the employees of the various clubs. It was derived from daily sales reports of the various clubs, which would indicate that an individual sold a membership on a particular day at the Schaumburg club. Petitioner objected to receipt of the exhibit on the grounds that the daily report is not a true or accurate indication of which employees worked at the Schaumburg club on any given day and that the record was not made in the ordinary course of business for the purpose for which it is used in this proceeding. Although it appears that the Employer's records, on which its interchange exhibit is based, is not the most accurate record possible, it does appear to be the only type of record maintained by the Employer which would shown any degree of interchange among the unit employees and it also appears to be reasonably accurate for the purpose introduced. Therefore, I will affirm the ruling of the hearing officer receiving Employer's Exhibit No. 8 into evidence.

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area supervisors, head tennis professional, professional employees, guards and supervisors as defined in the Act.

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Eliminating the interchange which occurred at the grand opening promotion on November 15-17, 1974, and that which occurred at the Bobby Riggs promotion on March 22-23, 1975, and without considering the interchange of managers and assistant managers, since the Schaumburg club opened for operation, 10 unit employees, all sales trainees, were temporarily transferred to the Schamburg location for a total of 28 days, generally 1 day at a time, and 10 employees, all sales trainees, were permanently transferred to the Schaumburg location for periods ranging from 1 month to as long as from January 1975 to the present time. There is no indication that other than during the promotions, any instructors, instructresses or any of the other unit employees were transferred to or from the Schaumburg facility. There are approximately 36 employees at the Schaumburg club, excluding managers and assistant managers who, at the time of the hearing, numbered five.

From the opening of the Schaumburg facility until October 2, 1975, it was under the supervision of two area supervisors, Al Phillips, who supervised the men's operations, and Dorothy Wildman, who supervised the women's operations Phillips has two assistant supervisors and all three spent a substantial amount of time at the Schaumburg club making it operational, as did Wildman and her assistant manager, Forsea. Testimony reflects that once the Schaumburg club was operating normally after opening in 1974, either the area supervisors or their assistants visited the club two or three times a week thereafter.

On October 2, 1975, the Schaumburg club came under the sole supervision of area supervisor Wildman and her assistant. From that time to the date of the hearing, testimony reflects that either Wildman or Forsea was in the Schaumburg club two or three times a week. There was testimony that certain individuals did not see either Wildman or Forsea in the club that often, but those individuals who testified would not necessarily have been in a position to know if either Wildman or Forsea was in the club on each visit. During their visits to the club, Wildman and Forsea may, among other things, check the sales, the number of prospective customers taking a tour of the club, the number of guests at the club, the hygienic conditions of the club, the condition of the equipment, the type of instruction being given, and whether the instructors and instructresses are filling out the required customer forms. During their visits, they may not only talk with the manager and assistant managers, but also to other personnel working at the club. In addition to visiting the clubs, either Wildman or Forsea calls each club three times a day. Although these calls are primarily concerned with sales, both prospective and completed, other problems such as maintenance, staffing and per-

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DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.

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sonnel are also discussed. Wildman or Forsea normally speak with the manager, if available, but if not, with one of the assistant managers. During the first call in the morning the manager or assistant manager may inform the area supervisor or assistant area supervisor that the club was shorthanded for the day and request the transfer of an employee from another club on a temporary basis. Transfers are solely arranged through the area supervisors and their assistants.

While there are a number of limitations placed on the authority and autonomy of the club manager, that which remains at the individual facility is most significant. Although the area supervisor or assistant area supervisory may visit each location two or three times a week, it is clear that the individual club manager represents the highest level of supervisory authority present in the facility for a substantial majority of the time.

Thus, the hiring of new employees, other than managers and assistant managers, is substantially controlled by each club manager at the individual club. Although the area supervisor sets the perameters for staffing and wage rates, within those limits the club managers have a great deal of latitude. An applicant makes application at the individual club and is interviewed either by an assistant manager or a manager, more usually by the manager. Since the Schaumburg club has opened and been fully staffed, recent hiring has been done to fill a vacant position, and normally the applicant was required to be able to work those hours where the vacancy existed. Part-time employees are hired and fired by the club manager without consultation with the area supervisor or assistant area supervisor. Full-time employees are hired with the approval of the area supervisor or assistant area supervisor, but the record does not indicate that approval has ever been denied, save in those cases where the applicant has worked for the Employer previously and there was prior knowledge of the applicant's employment activities. Managers can hire instructors or instructresses without experience either at $2.25 per hour or $2.50 per hour, and managers can hire instructors or instructresses with experience at rates up to $2.75 per hour. The record is not clear whether there are wage ranges for other unit jobs, but it is clear that the manager hires these individuals

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Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during

(Footnote continued from preceding page.)

based on her interview, or that of the assistant managers, and without further interview by the area supervisor or assistant area supervisor.

While the area supervisor and assistant area supervisor set the hours of the club, and approve the schedule of employees, it is the floor supervisors (a classification stipulated not to be supervisory) who set the hours for instructresses. The male assistant managers set the schedule for the instructors and it appears that the manager sets the hours for the other unit employees. In essence, however, as noted above employees are generally hired to fill a vacant spot in the schedule and it is rare that employees have their schedule of working hours changed.

Pay raises may be initiated by the club manager but must be approved by the area supervisor. Promotions must be approved by the area supervisor also. The hiring and wage rates of assistant managers are handled solely by the area supervisor or assistant area supervisor, although they may act upon the recommendation of a club manager.

Both managers and assistant managers may reprimand employees without consultation with the area supervisor or assistant area supervisor. In extreme cases, both managers and assistant managers have the authority to discharge or suspend employees without prior consultation with the area supervisor or assistant area supervisor. Normally, however, the area supervisors are notified when the manager or assistant managers wish to take any adverse personnel action.

Whether or not a proposed unit confined to one of two or more retail establishments making up an employer's retail chain or division thereof, is appropriate is to be determined in the light of all the circumstances of the case. *Sav-On Drugs,* 138 NLRB 1032. The general rule is that a single store in a retail chain is presumptively an appropriate unit for bargaining unless certain factors are present which establish that the single store has effectively been merged into a more comprehensive unit, thus losing its individual identity. *Sav-On Drugs, supra; Haag Drug Company, Incorporated,* 169 NLRB 877. While a unit coextensive with an employer's administrative or geographical area may also be appropriate, or even optimal, the presumption favoring a single store unit is not necessarily rebutted and the finding of a smaller unit as appropriate for collective bargaining is not precluded. *Drexel Enterprises, Inc.,* 180 NLRB 475.

In *Haag Drug Company, Incorporated, supra,* the Board noted that such factors as centralized bookkeeping, payroll records, purchas-

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that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election

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ing, merchandizing and advertising are of little or no significance in determining an issue such as that which exists herein. These functions are administrative or record keeping and do not directly affect the employees' day-to-day work performance or concern the daily matters which give significance to the community of interest of employees in the individual facility. Therefore, the authority of the club manager to handle such matters as hiring and firing, grievances and routine daily problems must be examined as one of the factors critical to the instant issues. It appears that for a substantial majority of the time, the club manager is the highest level of management present at the club and is in charge of the club's day-to-day operations. The club manager, and at times, the assistant managers, exercise a marked degree of control over hiring, hours, discipline and initial rates of pay, at least for instructors and instructresses. Furthermore, the facility is geographically separated from the other clubs, and essentially serves its own geographic area (save for the tennis courts which are unique to the Schaumburg club among the 16 metropolitan Chicago area clubs), and there is only a small amount of permanent and temporary interchange in the normal operations of the club, which does not tend to affect the stability of the single facility unit. It appears that the evidence herein, taken as a whole, does not rebut the presumption of the appropriateness of a single club unit, and I, therefore, find that the single club unit at Schaumburg, Illinois sought by the Petitioner is appropriate and shall order an election therein. *The Grand Union Company,* 176 NLRB 230; *Haag Drug Company, Incorporated, supra.*

Having found appropriate a unit limited in scope to the Employer's Schaumburg, Illinois club, the question of the composition of that unit must be resolved. As noted above, the status of the assistant managers is in issue, the Employer contending that those individuals who occupy that classification are supervisors, while the Petitioner contends that they are not supervisors and should be included within the unit.

Although the club manager is in charge of the entire operation of the club, the manager's primary responsibility is to sell memberships in the Employer's clubs. Donald, the present club manager at Schaumburg, estimates that she spends 60 to 70 percent of her time interviewing prospective members. The remainder of her time is spent making sure that the club is properly staffed, that employees are working well, that assistant managers and sales trainees are following the correct procedure in making their sales presentations, and that the facilities are kept hygenically clean and in good repair.

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date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls.

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The Schaumburg club is open from 7 a.m. until 10 p.m., Monday through Friday, and from 9 a.m. until 10 p.m. on Saturday and Sunday. Donald, the club manager, works from 10 a.m. until 5 p.m. on Monday, Wednesday and Thursday, and from 10 a.m. until 6 p.m. on Friday and Saturday. From 7 a.m. until 10 a.m. each weekday, a floor supervisor and a sales trainee are the sole employees in the club, although there is so little activity that no intructresses are present until 9 a.m. Except for those hours, whenever Donald is not present at the club, either because of her schedule, her vacation or for other reasons, various assistant managers are fully in charge of the club and responsible to the same degree as the manager. Donald generally calls the club once or twice a day on her days off to find out how the operation is doing.

While the other employees are paid an hourly wage and $5 for each membership sale, the assistant managers generally receive a daily salary plus a percentage of the adjusted gross of all sales made by everyone during the period they are present. One of the assistant managers receives in addition to the precentage of the gross sales, an hourly wage which is substantially higher than the wages of the other unit employees.

Although disputed by one assistant manager, it is clear from the entire record that assistant managers have the authority to discipline employees to a certain extent. The record reflects that, in one case, two of the assistant managers, without prior consultation with the manager, sent an employee home as a disciplinary measure. In other instances, assistant managers have reprimanded employees because of their appearance or demeanor or failure to perform their required duties. The record indicates many examples of individuals being recommended for hire or promotion or discharge by assistant managers. The record also reflects that at least two individuals were hired by assistant managers without prior approval by the club manager, although one of said individuals decided not to accept the job. In a third case, an assistant manager interviewed an applicant and recommended his employment. It appears that this applicant was hired without first being interviewed by the club manager Donald. Although there are no instances where this has occurred, assistant managers have, in the case of extreme emergency, authority to fire employees. An assistant manager has given permission for an employee to leave work early without first consulting with the club manager.

The assistant managers, at times, fill out the daily reports and daily breakdown sheets which are submitted to the central office.

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Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Retail Clerks Union, Local 1540, Chartered by Retail Clerks International Association, AFL-CIO.

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All the employees punch a time card and sign a time sheet. It is the responsibility of one of the assistant managers to make sure that the time sheet accurately reflects the time cards which is then sent in to the central office.

The assistant managers spend between 40 and 50 percent of their time selling memberships when the club manager is present and a greater percentage of time selling when the club manager is not present. When the area supervisor or assistant area supervisor is in the club, it is not uncommon for the assistant manager to meet with the visiting supervisor and discuss personnel matters in addition to other club problems.

On the basis of the above, and the record as a whole, I find that the assistant managers are supervisors within the meaning of the Act, and I exclude them from the unit herein. See *Fair Lady, Inc.*, 211 NLRB No. 22, wherein the Board affirmed a finding of an Administrative Law Judge that an assistant manager at one of HTCA's corporation's clubs in the Milwaukee area, performing duties similar to those performed by the assistant managers at issue herein, was a supervisor within the meaning of the Act.

Although the parties took no positions with respect to the head tennis professional, I find him to be a supervisor within the meaning of the Act. Although the record evidence is limited on this issue, it appears that the head tennis professional hires the tennis instructors without any participation by the club manager. He prepares his own financial reports detailing the operation of the tennis courts and sends them directly to the central office of the Employer. There is no information in the record as to the identity or duties of the tennis instructors, what their wages are, their hours, their benefits, the degree of community of interest they might have with the other club unit employees. Therefore, as the record is insufficient to make a determination regarding their placement, I will permit the tennis instructors to vote under challenge.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N. L. R. B.* v. *Wyman-Gordon Company*, 394 U. S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Thirteenth Region, Everett McKinley Dirksen Building, 219 South Dearborn Street, Room 881, Chicago, Illinois, 60604, on or before March 5, 1976. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D. C. 20570. This request must be received by the Board in Washington by March 11, 1976.

/s/ ALEX V. BARBOUR
Regional Director, Region Thirteen

[SEAL]

Dated February 27, 1976
at Chicago, Illinois

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1227

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* *vs.* CHICAGO HEALTH AND TENNIS CLUBS, INC., *Respondent.*	On Application for Enforcement of an Order of The National Labor Relations Board.

PETITION OF RESPONDENT FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

ARGUMENT.

Respondent, by Michael L. Sklar and Martin J. Dubowsky, its attorneys, petitions this Court for a rehearing *en banc*. There are two reasons for this petition:

1. The decision is in conflict with this Court's decision in *N. L. R. B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966), and with the decisions of the First, Second, Fifth and Sixth Circuit Courts of Appeal.[1]
2. The panel misread the record on a key issue of fact and compounded the error by applying one set of legal tests

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1. *N. L. R. B.* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (C. A. 1, 1967), *cert. den.* 389 U. S. 959 (1967); *N. L. R. B.* v. *Davis Cafeterias, Inc.*, 396 F. 2d 18 (C. A. 5, 1968); *N. L. R. B.* v. *Solis Theatre Corp.*, 403 F. 2d 381 (C. A. 2, 1968); *N. L. R. B.* v. *Pinkerton's Inc.*, 416 F. 2d 627 (C. A. 7, 1969); *N. L. R. B.* v. *Pinkerton's Inc.*, 428 F. 2d 479 (C. A. 6, 1970); *Wayne Oakland Bnak* v. *N. L. R. B.*, 462 F. 2d 666 (C. A. 6, 1972); *Szabo Food Service, Inc.* v. *N. L. R. B.*, 550 F. 2d 705 (C. A. 2, 1976).

on that issue to the instant case and a different set to *NLRB* v. *Saxon Paint & Home Care Centers, Inc.*, ... F. 2d ....., a case decided in the same opinion.

Respondent incorporates its original brief into this petition.

The only issue before the Court was whether the Chicago Health Clubs Schaumburg facility was an appropriate unit for collective bargaining purposes. Respondent's position was and is that the unit was not appropriate. On page 5 of the opinion in the instant case the panel sets forth 5 factors which must be examined in dealing with this issue. No single factor is determinative. The factors as stated by the Court include:

"(a) geographic proximity of the stores in relation to each other, *N. L. R. B.* v. *Kostel Corp.*, 440 F. 2d 347 (7th Cir. 1971); *Wil-Kil Pest Control Co.* v. *N. L. R. B.*, 440 F. 2d 371 (7th Cir. 1971);

"(b) history of collective bargaining or unionization, *Kostel Corp., supra; State Farm Mutual, supra;*

"(c) extent of employee interchange between various stores, *Walgreen Co.* v. *N. L. R. B.*, ... F. 2d ..... (7th Cir. 1977); *N. L. R. B.* v. *Pinkerton's Inc.*, 416 F. 2d 627 (7th Cir. 1969);

"(d) functional integration of operations, *State Farm Mutual, supra; N. L. R. B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966); and

"(e) centralization of management, particularly in regard to central control of personnel and labor relations, *Walgreen Co., supra; Wil-Kil Pest Control, supra; Frisch's Big Boy, supra.*"

Respondent does not quarrel with the statement of the law regarding factors which should be considered. However, these factors were not properly applied to Respondent by the panel. The panel basically conceded, as it must, the geographic proximity and functional integration factors to Respondent. Respondent operates 16 facilities in the Chicago area. All the evidence indicates that it is a tightly knit, highly centralized chain. In these regards it is virtually identical to the *Frisch's*

chain. That case involved 10 restaurants in the Indianapolis area and this Court decided that a unit of one of the restaurants was inappropriate. As to the remaining three factors set out as relevant by the panel it concluded:

"Based on the autonomy of the club manager, the insubstantial amount of employee interchange among the metropolitan clubs, and the absence of any collective bargaining history, we conclude that the Board's determination that a single store was an appropriate bargaining unit is reasonable in light of all the facts presented in this case." Opinion, at p. 15.

The panel was wrong in law and in fact.

1. Prior Bargaining History.

The panel seemed to feel that because Respondent did not have any bargaining history[2] that fact militated against its argument that the Schaumburg facility was not an appropriate unit. This determination flies in the face of established law. Prior history has only been considered where such history exists. If there is none, that factor does not cut either way. For example, in the *Frisch's* case, decided by this Court, no mention is made of prior bargaining history as it was simply not a factor. To use the lack of any history as a negative factor is a misapplication of the law. In all cases where there is no bargaining history that fact is disregarded.

2. Employee Interchange.

It is here that the panel made its most grievous error regarding this case. On page 14 of the opinion the Court states that the interchange was "minimal". Attached to this petition

2. However, there were prior attempts to organize sister corporations of Respondent in Milwaukee and Michigan on area-wide basis by other unions. See *Fair Lady, Inc.*, 211 N. L. R. B. No. 22. The Milwaukee clubs operated in the same manner as the Chicago Clubs. This is in the record. See Respondent's brief to the Regional Director and attachments thereto.

as Schedule "A" is a list of 108 specific people who were transferred to the Schaumburg facility during the 11 month period from its opening to the date of the hearing. The total size of the supposed unit is 36. ***It is incredible that the Court considered this kind of interchange "minimal"***. Details on this interchange are found in the Appendix on pages 24 through 31 which breaks down the interchange by job classification, dates and locations. Even excluding transfers for special events and excluding all supervisory transfers, there were still 10 permanent employees and 10 temporary employees transferred into the Schaumburg Club. Counting the number of transfers in this club as opposed to the number of employees reveals 13 permanent and 24 temporary transfers. During that same period there were 9 permanent transfers of supervisory personnel. These facts were totally ignored by the panel.

The most disturbing thing about the finding that this extreme amount of transfers was considered "minimal" by the Court is that in the companion case, *N. L. R. B.* v. *Saxon Paint & Home Care Centers, Inc.*, ... F. 2d ..... the same panel found that employee interchange in an amount of 18% of the unit was "significant". In the *Saxon* case the Court also took note of the supervisory employees transferred which raised the total to 25%. Supervisory transfers were totally disregarded by the same panel in the *Chicago Health Club* case even though there were 9 supervisors permanently transferred.[3]

It should also be pointed out that no mention was made of any employee transfers in the *Frisch's* case where the single store unit was still found inappropriate.

3. The panel stated at footnote 16 that no "instructors" were *ever* temporarily transferred to or from Schaumburg. This is plainly wrong. The Appendix at pp. 30-31 reveals that at least 25 employees in this category were transferred.

3. Central Control of Personnel and Labor Relations.

In the *Frisch's* case the Restaurant managers had the authority to hire and fire and perform other administrative tasks within company set parameters. This Court, however, did not consider those ministerial functions central to the issue of collective bargaining.

The importance of this distinction between ministerial functions and control over the subjects of collective bargaining has been recognized time and again. In *Solis, supra,* managers could hire, fire and discipline employees. In *Davis* and *Purity Foods* they could hire and fire and in *Wayne Oakland Bank* they had disciplinary prerogatives. These qualities alone have been recognized both by the Board and the Court of Appeals not to be determinative. The real question is who is deciding the meat and potatoes issues of collective bargaining such as wage rates and employee benefits. This distinction is recognized by the Board itself, *Food Marts, Inc.*, 200 N. L. R. B. No. 5 (1972); *21st Century Restaurant of Nostrand Avenue Corp.*, 192 N. L. R. B. No. 103 (1971); *Waiakamilo Corp., d/b/a McDonalds,* 192 N. L. R. B. No. 102. There is not one hint of evidence in the 1,200 page transcript that the local *Chicago Health Clubs* manager Barbara Donald had authority to make decisions upon collective bargaining issues. Her authority was no different than the restaurant managers in *Frisch's* or the managers in *Solis, Davis* or *Purity Foods*. To find that she had sufficient autonomy to form the basis of a bargaining unit determination avoids the glaring facts that:

(a) she had no control over the traditional issues of collective bargaining;

(b) area supervisors visited the club 2 or 3 times a week and called 2 or 3 times a day;

(c) Wages, store hours and vacation periods are all controlled by the central office; and

(d) she spent approximately 70% of her time in a sales position.

In Frisch's, the store manager had no less authority than Barbara Donald, but this Court stated:

> It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining. 356 F. 2d at 897.

CONCLUSION.

With all due respect, Respondent submits that the panel seriously erred in applying the law to the compelling facts of this case. It erred in considering the lack of a prior bargaining history against Respondent, rather than a neutral fact; in disregarding the massive interchange evidence; and in exaggerating the importance of the local manager when she had no control over traditional collective bargaining issues. Thus, the result reached by the panel was in sharp contrast with the *Frisch's* case and established law.

It is possible that the errors were made because of the simultaneous consideration by the panel of this case and *Saxon Paint*. It is evident from the obvious contradictions in the two cases regarding the standards for employee interchange as set forth herein and other facts[4] that Respondent was not given independent and fair consideration of its own case.

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4. For example, in footnote 4 on page 3 of the opinion the panel notes that one of the three Board members, Peter D. Walther, dissented from the Board's denial to review the Director's decision in *Saxon*. Although the same member dissented under the same circumstances in *Chicago Health Clubs*, the panel totally disregarded that fact.

Therefore, it should be granted a rehearing *en banc*.

Respectfully submitted,

MICHAEL L. SKLAR,
MARTIN J. DUBOWSKY,
Counsel for Respondent.

FOHRMAN, LURIE, HOLSTEIN,
SKLAR & COTTLE, LTD.,
180 North Michigan Avenue,
Chicago, Illinois 60601,
312-641-5252,
Of Counsel.

APPENDIX

SCHEDULE A

SUMMARY OF EMPLOYEE TRANSFERS TO CHICAGO HEALTH CLUBS SCHAUMBURG FACILITY NOVEMBER, 1974 THROUGH OCTOBER, 1975

Name	Classification S-Supervisory Employee U-Unit Employee	(P) Permanent Transfer (T) Temporary Transfer
Nanette Habershow	U	P
Marilyn Jones	S	P
Terry Baker	S	P
Ellen Bastian	U	T
Sharon Marsala	S	T
Helen Bradley	S	P
Diane Zimovske	S	T
Lorie Lednovich	U	T
Susan Mitsui	U	P
Bob Sanders	S	T
Cathy Gohczy	U	T
Helen Bostrum	S	T
Gail Bussa	S	P
Carol Cox	S	T
LaRue Martin	S	T
Margi Larsen	S	T
Linda Majka	S	T
Linda Tonnemaker	S	T
Al Ruggiero	U	T
Don Czeszewski	S	P
Patty Martin	U	T
Jim Bryant	U	P
Carol Sternberg	U	T
Bob Long	S	P
Chuck Pepe	S	P

Name	Classification S-Supervisory Employee U-Unit Employee	(P) Permanent Transfer (T) Temporary Transfer
David Hursh	S	T
Joe Coco	S	T
Fred Belcastro	S	T
Larry Kuhl	S	T
Jack Radkovich	U	T
Jan Minneti	S	T
Mike Brosskropk	U	T
Tom Eksenburg	S	T
Andy Polluk	S	T
Jim Collison	S	T
Bob Kania	S	T
Dave Story	S	T
Stan Sydock	U	T
Paul Burck	U	T
Edward W. Dase	U	T
Barbara Donald	S	P
Jeff Roberts	U	P
Linda Fridenburg	U	P
Steve Cohen	N/A	P
Branka Popovich	U	P
Don Wildman, Jr.	U	P
Pat O'Connor	U	T
Patty Whitacre	U	P
Terry Bambulas	S	P
Gail Bradhead	S	T
Jackie Rogaski	U	P
Marilyn Blazek	U	T
Debra Delrosso	U	P
Toniel Tondu	U	T
Bob Molnar	S	T
Ron Eldred	S	T
Leroy Hunt	S	T
Rowdy Russell	U	T
Bonnie Nolan	S	T
Ruth Posh	S	T
Judy Mosser	S	T

Name	Classification S-Supervisory Employee U-Unit Employee	(P) Permanent Transfer (T) Temporary Transfer
Debbie Skiba	S	T
Dick Zurick	S	T
Sherley Welcome	S	T
Jerry Castino	S	T
Eddy Kostelyk	S	T
Kevin Noble	U	T
Bill Milburn	S	T
Maria Westwood	S	T
Andy Levant	S	T
Romy Wyett	S	T
Pam Leonhard	S	T
Chuck Ortiz	U	T
E. Knight	U	T
C. Tindell	S	T
D. Gray	S	T
Jo Radakovitz	S	T
Jayney Scandiff	S	T
Karen Sliwinski	U	T
Carla Capollo	S	T
Judy McDonald	S	T
Caren Beattie	U	T
Carol Blewitt	S	T
Glena Bayer	U	T
Lynn McCann	U	T
Carol Sterburg	U	T
Debra McCurty	U	T
Rita May Banner	U	T
Christine Mortenson	U	T
Corine Nierman	U	T
Romy Wyett	U	T
Jean Lisluskas	U	T
Karen Gorman	U	T
Evelyn Jankovski	U	T
Denise Kachiroubas	U	T
Susann Wickum	U	T
Barbara Wood	U	T

Name	Classification S-Supervisory Employee U-Unit Employee	(P) Permanent Transfer (T) Temporary Transfer
Christina Frimgen	U	T
Robert Herley	U	T
Stan Sydock	U	T
Angela Blondi	U	T
Astred Dobrestin	U	T
Lourell Frykholm	U	T
Janee Waters	U	T
Susane Kulhea	U	T
Nancy Bak	U	T
Hermina Bean	U	T
Anastasia James	U	T
Marcia Mironi	U	T

Total Permanent Unit Employees Transferred	10
Total Permanent Supervisory Employees Transferred	9
Total Temporary Unit Employees Transferred	46
Total Temporary Supervisory Employees Transferred	43
Unit Size:	36

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 28, 1977

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, No. 77-1227 *vs.* CHICAGO HEALTH & TENNIS CLUBS, INC., *Respondent*.	Petition for Enforcement of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the respondent, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Hon. William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 30, 1977

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, No. 77-1227 *vs.* CHICAGO HEALTH & TENNIS CLUBS, INC., *Respondent*.	Petition for Enforcement of an Order of the National Labor Relations Board.

This matter comes before the court on its own motion, it being fully advised in the premises,

IT IS ORDERED that the order of December 28, 1977 denying the petition for rehearing and suggestion for rehearing in banc filed herein be, and the same is hereby, VACATED.

* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 6, 1978

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	Petition for Enforcement of an Order of the National Labor Relations Board.
No. 77-1227 *vs.*	
CHICAGO HEALTH & TENNIS CLUBS, INC., *Respondent.*	

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the respondent, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Hon. William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

The relevant provisions of the National Labor Relations Act, as amended (29 U. S. C. § 151 et seq.), are as follows:

* * * * *

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this Act.

* * * * *

Section 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

No. 77-1420

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHICAGO HEALTH CLUBS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

EDWARD S. DORSEY,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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No. 77-1420

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 567 F. 2d 331. The decision and order of the National Labor Relations Board (Pet. App. A17-A29) are reported at 226 NLRB 1202. The Decision and Direction of Election of the Regional Director (Pet. App. A30-A40) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 6, 1978 (Pet. App. A54). The petition for a writ of certiorari was filed on April 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably exercised its discretion to determine appropriate collective bargaining units by establishing a unit consisting of the employees at the Company's Schaumburg, Illinois, facility, rather than a unit composed of the employees at all of its sixteen health clubs in the Chicago area.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at page A55 of the appendix to the petition.

STATEMENT

1. Petitioner ("the Company") operates 16 health clubs within a 28-mile radius of its central office in downtown Chicago (Pet. App. A31 n. 4). The Retail Clerks Union, Local 1540 ("the Union") petitioned the Board for a representation election among the

employees at the Schaumburg, Illinois, club. The Company opposed the petition, urging that the proper unit encompassed all 16 clubs (*ibid.*).

After an evidentiary hearing on the petition, the Board's Regional Director found that the Schaumburg club manager exercises extensive control over those aspects of the operation that directly affect the day-to-day working conditions of the employees, possessing the authority to hire, fire, reprimand, initiate pay raises, and schedule working hours (Pet. App. A35-A36 n. 4). He further found that those aspects of the business which are centralized are primarily billing, payroll, and other record-keeping; customer sales matters; and equipment purchase and maintenance (Pet. App. A32 n. 4).

In addition, the Regional Director found that there were few permanent transfers of non-supervisory personnel from other clubs to the Schaumburg club (Pet. App. A33-A34 n. 4). The temporary transfers of non-supervisory personnel were related to two promotional events or involved sales trainees, a classification with high turnover (*ibid.*).[1] The Regional Di-

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[1] The Regional Director stated (Pet. App. A34 n. 4):

> Eliminating the interchange which occurred at the grand opening promotion on November 15-17, 1974, and that which occurred at the Bobby Riggs promotion on March 22-23, 1975, and without considering the interchange of managers and assistant managers, since the Schaumburg club opened for operation, 10 unit employees, all sales trainees, were temporarily transferred to the Schaumburg location for a total of 28 days, generally

rector also found that the Schaumberg club is at least several miles distant from the others and tends to serve its own geographical area (Pet. App. A37 n. 4).

The Regional Director concluded that the Schaumburg, Illinois, club was an appropriate unit for collective bargaining. He explained (Pet. App. A36-A37 n. 4):

> Whether or not a proposed unit confined to one of two or more retail establishments making up an employer's retail chain or division thereof is appropriate is to be determined in the light of all the circumstances of the case. *Sav-On Drugs*, 138 NLRB 1032. The general rule is that a single store in a retail chain is presumptively an appropriate unit for bargaining unless certain factors are present which establish that the single store has effectively been merged into a more comprehensive unit, thus losing its individual identity. *Sav-On Drugs, supra; Haag Drug Company, Incorporated*, 169 NLRB 877 * * *.
>
> * * * [S]uch factors as centralized bookkeeping, payroll records, purchasing, merchandising and advertising are of little or no significance in

---

1 day at a time, and 10 employees, all sales trainees, were permanently transferred to the Schaumburg location for periods ranging from 1 month to as long as from January 1975 to the present time. There is no indication that other than during the promotions, any instructors, instructresses or any of the other unit employees were transferred to or from the Schaumburg facility. There are approximately 36 employees at the Schaumburg club, excluding managers and assistant managers who, at the time of the hearing, numbered five.

> determining an issue such as that which exists herein. These functions are administrative or record keeping and do not directly affect the employees' day-to-day work performance or concern the daily matters which give significance to the community of interest of employees in the individual facility. Therefore, the authority of the club manager to handle such matters as hiring and firing, grievances and routine daily problems must be examined as one of the factors critical to the instant issues. It appears that for a substantial majority of the time, the club manager is the highest level of management present at the club and is in charge of the club's day-to-day operations. The club manager, and at times, the assistant managers, exercise a marked degree of control over hiring, hours, discipline and initial rates of pay, at least for instructors and instructresses. Furthermore, the facility is geographically separated from the other clubs, and essentially serves its own geographic area * * *, and there is only a small amount of permanent and temporary interchange in the normal operations of the club * * *. It appears that the evidence herein, taken as a whole, does not rebut the presumption of the appropriateness of a single club unit. * * *

The Board denied the Company's request for review of the Regional Director's unit determination, and the ensuing representation election was won by the Union, which was then certified by the Board as the unit employees' collective bargaining agent (Pet. App. A19). When the Company refused to bargain

with the Union, the Board, on summary judgment, found its refusal violative of Section 8(a)(5) and (1) of the Act and ordered the Company, *inter alia*, to bargain with the Union (Pet. App. A22-A23).

2. The court of appeals enforced the Board's order, concluding that "substantial evidence supports the Board's finding that a single club is an appropriate bargaining unit" (Pet. App. A14). The court added that "[b]ased on the autonomy of the club manager, the insubstantial amount of employee interchange among the metropolitan clubs, and the absence of any collective bargaining history, we conclude that the Board's determination that a single [club] was an appropriate bargaining unit is reasonable in light of all the facts presented in this case" (Pet. App. A16).

The court particularly noted that, "unlike the store managers in *Saxon Paint*, the club managers exercise a marked degree of control over personnel and labor relations matters" (Pet. App. A15).[2] Moreover, in

[2] The court joined the instant case with *National Labor Relations Board* v. *Saxon Paint & Home Care Centers, Inc.*, No. 77-1504, a retail chain store case in which the Board had found a single store unit appropriate. In *Saxon Paint*, the court found, contrary to the Board, that the stores were highly integrated in their operations and that control of personnel and labor relations policies was centrally administered (Pet. App. A8). The court in particular noted that the Saxon Paint store managers had no authority to hire, grant raises, discipline, handle grievances, grant requests for vacations, transfer employees or post a work schedule without approval (Pet. App. A9). The court therefore concluded that a single Saxon Paint store is an inappropriate unit, and declined to enforce the Board's order (*id.* at A13). No issue relating to *Saxon Paint* is involved here.

addition to having control over hiring, firing, and other disciplinary matters (*ibid.*):

> The club manager exercises control over the working conditions of employees in many other respects. For example, the club manager handles employee complaints and grievances about wages and hours, schedules vacations, grants or denies overtime, decides whether employees may take their lunch break on or off the premises, administers the local payroll system, and trains employees in exercise instruction and sales. Thus, unlike *Saxon Paint* and like *Walgreen*,[3] much of the day-to-day employment activities are supervised directly by the local club manager "without significant interference" by the central corporate organization.

ARGUMENT

The Company contends that, in determining appropriate units in retail chain stores, the Board and the Seventh Circuit employ a "presumption test" (Pet. 4) that differs from the " 'balancing of interests' test" employed by other Circuits (Pet. 5) and which amounts to an "absolute rule" approving single store units "allow[ing] the Board to avoid explaining the bases for its decisions * * *" (Pet. 7). We disagree.

[3] *Walgreen Company* v. *National Labor Relations Board*, 564 F. 2d 751 (C.A. 7).

1. While the Act does not lay down specific standards for making unit determinations, over the years the Board has developed a number of criteria, including the criterion that a single plant unit is "presumptively appropriate." *Haag Drug Co., Inc.*, 169 NLRB 877, 878. Initially, the Board did not apply this presumption to retail chain operations,[4] but in 1962 the Board announced that it would "apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general." *Sav-On Drugs, Inc.*, 138 NLRB 1032, 1033.

In 1968, in *Haag Drug*, *supra*, the Board further explicated this policy. It emphasized that the presumption was "not a conclusive one and may be overcome where factors are present in a particular case which would counter the appropriateness of a single-store unit." 169 NLRB at 878. And, in determining whether employees of a single location may constitute an appropriate unit, the Board observed that it would look particularly to "whether or not the employees perform their day-to-day work under the immediate supervision of a local * * * manager who is involved

[4] Between 1951 and 1962, giving controlling weight to the administrative structure of retail chain operations, the Board applied a strong presumption against single-location units. Thus, the Board declared that "absent unusual circumstances, the appropriate collective bargaining unit in the retail * * * trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or area." *Safeway Stores, Inc.*, 96 NLRB 998, 1000.

in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems" (*ibid.*).[5] However, the Board made clear that it would also look, *inter alia*, to whether the single location "lacks meaningful identity as a self-contained economic unit, or the actual day-to-day supervision is done solely by central office officials, or * * * there is substantial employee interchange" with other locations (*id.* at 879).

Thus, the "presumption" involved here requires the Board in the case of a retail chain operation to weigh the various factors which determine appropriateness of a unit (see Pet. App. A5-A6), just as it does in other industries. And, as shown in the Statement (*supra*, pp. 3-7), both the Board and the court of appeals weighed such factors as the degree of centralized managerial control, the extent of employee interchange, the integration of the various clubs' operations, the geographic proximity of the clubs,

[5] While recognizing that retail chain operations often are marked by a high degree of centralized administration, the Board noted that such recordkeeping and administrative functions "have little or no direct relation to the employees' day-to-day work and employee interests in the conditions of their employment." 169 NLRB at 878. Moreover, drawing a distinction because of this factor "would artificially disadvantage the organizational interests of chain store employees, simply because their employer operates a chain rather than a single-store enterprise * * *" (*ibid.*).

and the prior bargaining history in deciding that the single club unit was appropriate in this case.

Petitioner's contention that the Seventh Circuit applies an "absolute rule" is further belied by its decision here. Although it upheld the Board's unit determination after weighing all of the relevant factors in the instant case, it set aside the Board's unit determination in the companion case, *Saxon Paint* (*supra*, n. 2), after weighing the same factors there.

2. The First, Second, Fifth and Sixth Circuits apply no different test, as an examination of the cases cited by the Company demonstrates.

Thus, the First Circuit in *National Labor Relations Board* v. *Purity Food Stores, Inc.*, 376 F. 2d 497, 501 (Pet. 4-5), like the court below in *Saxon Paint*, *supra*, held that the single store unit presumption did not overcome such factors as personnel practices and procedures (hiring and training) which were centralized and integrated (*id.* at 499) and a high degree of employee interchange (*id.* at 500). However, that Circuit has upheld single store units where, as here, there is little employee interchange and the store manager has authority over day-to-day working conditions. *Banco Credito* v. *National Labor Relations Board*, 390 F. 2d 110, 112 (C.A. 1).

Similarly, in *Continental Insurance Company* v. *National Labor Relations Board*, 409 F. 2d 727, 729 (C.A. 2) (Pet. 5), the Second Circuit upheld the Board's single office unit determination, balancing

the same factors the court weighed here and distinguishing on their facts cases, such as *National Labor Relations Board* v. *Solis Theatre Corp.*, 403 F.2d 381 (C.A. 2) (Pet. 5), where the Board's unit determination had been rejected.

In *National Labor Relations Board* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18, 20-21 (Pet. 5), the Fifth Circuit rejected the Board's unit determination because the record showed that "labor policy is centrally determined, and * * * local managers do not have authority to decide questions which would be subjects of collective bargaining * * *." However, in *Groendyke Transport, Inc.* v. *National Labor Relations Board*, 438 F.2d 981, 982, that Circuit upheld a Board determination that a single unit was appropriate, rejecting the contention petitioner makes here, that the single store unit "sanction[s] piecemeal unionism." Similarly, in *Michigan Hospital Service Corp.* v. *National Labor Relations Board*, 472 F.2d 293, 296, the Sixth Circuit, quoting *National Labor Relations Board* v. *Western and Southern Life Insurance Co.*, 391 F.2d 119, 123 (C.A. 3), upheld a single office unit determination where the office manager possessed considerable autonomy over personnel matters, commenting that, while "[t]he Board may certainly consider the interests of an integrated multi-unit employer in maintaining enterprise-wide labor relations," it was entitled to give the interest of the employees in freely choosing a bargaining representative " 'greater weight than that accorded to the

employer in bargaining with the largest, and presumably most convenient possible unit.' " [6]

3. In sum, the only issue actually presented here is whether the record supports the Board's determination that a single club unit was appropriate in the circumstances of this case. That essentially factual issue does not warrant review by this Court. In any event, for the reasons set forth above (pp. 3-7), the Board's determination is reasonable and fully supported by the evidence.

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[6] In *National Labor Relations Board* v. *Pinkerton's, Inc.*, 428 F.2d 479 (C.A. 6) (Pet. 5), the court denied enforcement of the Board's order because it found matters subject to collective bargaining to be centrally determined. Similarly, in *Wayne Oakland Bank* v. *National Labor Relations Board*, 462 F.2d 666, 668-669 (C.A. 6) (Pet. 5), the court found that the record did not support the Board's "finding that any branch manager has substantial responsibility in relation to the substantive matters subject to collective bargaining."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel.

JOHN E. HIGGINS, JR.,
Deputy General Counsel.

NORTON J. COME,
Deputy Associate General Counsel.

LINDA SHER,
Assistant General Counsel.

EDWARD S. DORSEY,
Attorney,
National Labor Relations Board.

JUNE 1978.

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